Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1623

E. L. FOWLER,

*Petitioner,*

v.

W. E. STRICKLAND, STATE REVENUE COMMISSIONER OF GEORGIA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

J. ROGER THOMPSON
FRANK J. PETRELLA
2403 National Bank of Georgia Building
Atlanta, Georgia 30303
404-688-0440

*Attorneys for Petitioner*

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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Petitioner E. L. Fowler respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia entered on January 24, 1979.

OPINION BELOW

The opinion of the Supreme Court of Georgia was reported at 243 Ga. 30, --S.E.

2d--(1979), and is reproduced at Appendix "A", infra.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on January 24, 1979. No petition for rehearing was filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

ONE

Does the Georgia Sales and Use Tax Act as applied to Petitioner violate the due process clause of the Fourteenth Amendment by failing to provide notice and opportunity to be heard prior to levy on personal bank accounts?

TWO

Was Petitioner's right to a trial by jury guaranteed by the Fourteenth Amendment and the Georgia Constitution violated by the denial of Petitioner's jury demand?



THREE

Did the lower court in rendering and upholding the judgment against Petitioner depart from the accepted and usual course of proceedings so as to call for an exercise of this Court's supervising power?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

See Appendix "B" attached, infra.

STATEMENT OF THE CASE

Commencing at a point in time in 1968 or 1969, Petitioner discontinued collection of state sales tax in his business, the Tifton Monument Company. As a result of a third-party taxpayer complaint, an audit investigation was initiated by Respondent to determine if Petitioner was failing to collect and pay sales tax. Because of Petitioner's refusal to provide his personal business records to Respondent, an estimated assessment of sales tax was computed. A fi. fa. was issued, and Respondent began

efforts to levy upon personal property of Petitioner. An affidavit of illegality was filed by Petitioner in Tift County Superior Court to forestall the execution of levy. A surety bond from Petitioner was required.

Petitioner filed a pro se demand for jury trial which was denied by the trial court. A non-jury trial followed. Respondent, as plaintiff in fi. fa. introduced into evidence a copy of the fi. fa. and the testimony of several witnesses on the method of computation of the assessment. A judgment of $14,796.46 was entered against Petitioner, and was affirmed by the Supreme Court of Georgia.

The issue of constitutionality of the Sales and Use Tax Act was initially raised at the trial level by Petitioner's oral assertions that the statute, requiring him to collect tax on behalf of the State of Georgia, subjected him to involuntary



servitude and further deprived the people of the state of their right to tax themselves. A due process and equal protection attack was sua sponte ruled upon by the trial court. The Supreme Court of Georgia directly addressed the issue of constitutionality. See Appendix "A", infra.

## REASONS FOR GRANTING THE WRIT

### ONE

Following a third-party taxpayer's complaint, Respondent began an audit investigation of Petitioner's failure to pay or collect state sales tax. An assessment of tax liability was rendered by Respondent, a fi. fa. was issued and Respondent began to levy upon personal bank accounts of Petitioner.

At no time did Petitioner have access to rudimentary procedural due process protections against erroneous summary taking of private property by the State of Georgia. Georgia Code Ann. § 92-7301 does not allow

for judicial supervision prior to restraint, a flaw previously found by this Court to form a basis of invalidation. See, Sniadach v. Family Finance, 394 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975). Petitioner acknowledges that limited exceptions to Sniadach and its progeny exist, but asserts that the facts at bar require a different analysis. In rendering its earlier decision of Gainesville-Hall v. Blackmon, 233 Ga. 507 (1975), the Supreme Court of Georgia cited Phillips v. Commissioner, 283 U.S. 589 (1931) as a recognized exception to the requirement of pre-seizure opportunity for judicial hearing. Reliance on Phillips was misplaced, as the particularized need of Phillips does not appear in the area of collection of state sales tax. Absent a showing of a true "extraordinary situation", due process is not satisfied by a post-seizure opportunity for a judicial hearing.



TWO

Pursuant to the authority of Georgia Code Ann. § 92-7301, Petitioner filed an affidavit of illegality to determine whether sales taxes were legally due and owing.[1] A pro se demand for jury trial was filed. The trial court denied the jury demand and ordered the issue to be summarily heard and determined by the court.

In his brief to the Supreme Court of Georgia, Petitioner asserted that the Seventh Amendment to the Constitution required a trial by jury. In addition, Petitioner argued that Georgia Code Ann. § 2-4401 required a similar result.[2]

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[1]The affidavit stated Petitioner was not indebted to Respondent for any sales tax; that he only had an interest in the property levied upon, and was not the owner thereof; and the assessment was arbitrarily determined.

[2]"The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior court."

Section 92-7301 is repugnant to the Constitution of the State of Georgia through its denial of a jury trial. Such repugnancy is violative of due process as guaranteed by the Fourteenth Amendment to the Constitution. Due process required jury determination of the issue joined.

THREE

The appellate court below upheld the judgment of the trial court against claims of insufficiency of the evidence. In doing so, the court departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervising power.

At trial, Respondent presented two witnesses on the issue of sales and the resultant imposition of sales tax. Each professed to know nothing about Appellant's monument business and related sales. Witness James Jennings testified to a formulation where sales were computed on a basis



of bags of cement purchased by Petitioner.[3] Louis Norman, a witness supplying base data to Mr. Jennings, testified that upwards of five bags of concrete might be used to set one stone and under other circumstances as many as six bags of cement would be required. It was not disputed that Witness Jennings knew nothing of the monument business, and yet he was qualified as an expert. By his very own witnesses, Respondent could not state whether monument sales could be determined reliably by the use of the amount of concrete consumed. The situation was further complicated by the inability of Respondent to determine actual cost of sales to Petitioner, Respondent having relied on the information of third parties and assumptions as to the cost of lettering monuments. Furthermore, selling price was assumed.

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[3]Mr. Jennings stated that the amount of concrete used for a particular monument would be one and one half to two bags of cement.

Using the aforementioned analysis, Respondent, at least to the satisfaction of the trial court and the Supreme Court of Georgia, was able to determine Petitioner's gross sales between July 1974 and September 1977.

Respondent did introduce through William Stark sales contracts and bank statements of Petitioner. The judgment of the court did not match in any way the facts introduced through the witness Stark, which constituted the only factual basis upon which the trial judge could have lawfully based a verdict. The judgment of the trial court and its subsequent affirmance by the Supreme Court of Georgia is a precedent-setting error of public importance. To allow such a decision to stand jeopardizes the ability of a taxpayer to obtain a method of computation in accord with fundamental fairness.

## CONCLUSION

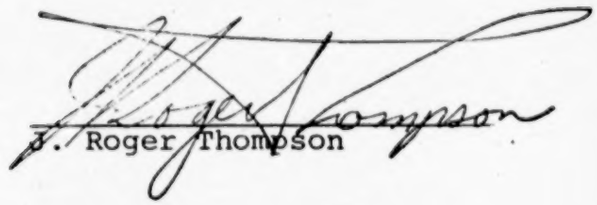
For the foregoing reasons, Petitioner



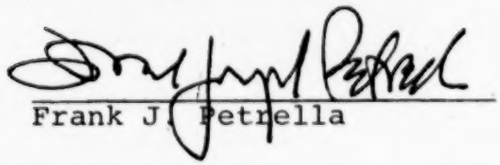
prays that his petition for writ of certiorari be granted.

This the 23rd day of April, 1979.

Respectfully submitted,



J. Roger Thompson



Frank J. Petrella

2403 National Bank of Georgia
Building
34 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 688-0440

## APPENDIX A

### 34250. FOWLER v. STRICKLAND.

MARSHALL, Justice.

The appellant taxpayer is engaged in the reatil sale of tangible personal property. He is classified as a "dealer" under the Georgia Retailers' and Consumers' Sales and Use Tax Act (Ga. L. 1951, pp. 360, 362; Code Ch. 92-34A). See Code Ann. § 92-3404a. (Citations to the Sales and Use Tax Act will be given by Code section.)

In 1968, the appellant ceased collecting sales taxes and remitting them to the state.[1] He also ceased filing tax returns.[2] An audit investigation by the appellee State Revenue Commissioner was later begun, but the appellant refused to provide the commissioner with any of his business records.[3] The commissioner then served on the taxpayer notices to produce his business records, but he refused to respond to these either.

Based on all the available information, the commissioner then made an estimate of the taxpayer's sales tax liability for the taxable period,[4] and an assessment for unpaid sales taxes based on this estimate was served on the taxpayer. He did not appeal this assessment, and the commissioner issued a tax fi. fa. and began levying on the taxpayer's bank accounts.[5] The taxpayer then filed an

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[1] This was in violation of Code Ann. §§ 92-3402a (a) and 92-3405a.

[2] This was in violation of Code Ann. § 92-3424a.

[3] This was in violation of Code Ann. § 92-3428a.

[4] The commissioner was authorized to do this, either under Code Ann. § 92-3432a or Code Ann. § 92-3427a.

[5] The commissioner was authorized to do this under Code Ann. § 92-3432a, supra.

affidavit of illegality in superior court,[6] which was traversed by the commissioner. The case proceeded to a trial without a jury, and a judgment was entered in favor of the commissioner. The taxpayer appeals.

1. In the first four enumerations of error, the taxpayer argues that the commissioner failed to carry his burden of proving the number of retail sales made by the taxpayer during the taxable period. The taxpayer argues that it was necessary to prove this in order to establish his sales tax liability.

"In the event any dealer fails to make a report and pay the tax as provided by this Chapter, or in case any dealer makes a grossly incorrect report, or a report that is false or fraudulent it shall be the duty of the commissioner to make an estimate for the taxable period of retail sales of such dealer, or of the gross proceeds from rentals or leases of tangible personal property by the dealer, and an estimate of the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed [in] this State and assess and collect the tax and interest, plus penalty, if such have accrued, on the basis of such assessments, which shall be considered prima facie correct, and the burden to show the contrary shall rest upon the dealer." Code Ann. § 92-3427a. See also Code Ann. § 92-3432a.

The effect of the language of the previously quoted

[6] Code Ann. § 92-7301 authorizes a taxpayer to test the legality of a tax which is allegedly due by filing an affidavit of illegality. This is one of four available procedures under which a taxpayer in this state can contest his liability for state taxes. See Harrold, A Practical Guide to State Tax Practice, 15 Ga. St. Bar J. 74 (Oct., 1978).



statute is to shift to the taxpayer the burden of going forward with evidence to dispute the correctness of an assessment made thereunder. *Hawes v. Foster*, 118 Ga. App. 296 (163 SE2d 351) (1968) and cits. It has also been held that where a taxpayer attacks the legality of a tax levy by affidavit of illegality, the revenue commissioner makes out a prima facie case by introducing the tax fi. fa., and the burden of going forward with evidence shifts to the defendant in fi. fa. *Dept. of Revenue v. Stewart*, 67 Ga. App. 281 (4) (20 SE2d 40) (1942).

Thus, we find that the commissioner carried his burden of proof by producing the tax fi. fa. and assessment, and since the taxpayer failed to come forward with evidence disputing the correctness of the assessment or attacking the levy, we hold that the commissioner was entitled to a judgment. We therefore find these enumerations of error to be without merit.

2. In the fifth enumeration of error, the appellant complains of the overruling of his motion to disqualify the trial judge.

At the hearing on the motion to disqualify the trial judge, the appellant alleged that the trial judge should disqualify himself because, at the calendar call of the case, the judge had stated that the appellant was in serious trouble and that he would have to prove that he would not owe any taxes. The appellant also alleged that the trial judge, in his previous capacity as solicitor, had prosecuted the appellant in a criminal case.

Neither of these alleged grounds was sufficient to require the trial judge to disqualify himself. See *Savage v. Savage*, 238 Ga. 16 (230 SE2d 851) (1976) and *Clenney v. State*, 229 Ga. 561 (192 SE2d 907) (1972). We find these enumerations of error to be without merit.

3. In the sixth enumeration of error, the appellant argues that the Sales and Use Tax Act is unconstitutional as applied to him. He argues that the failure to give him notice and an opportunity to be heard prior to issuance of the tax fi. fa. and subsequent levy on his bank accounts violates the due process clause of the Fourteenth Amendment. As authority for this argument, the appellant cites Sniadach v. Family Finance Corp., 395 U.S. 337 (89 SC 1820, 23 LE2d 349) (1969) and its progeny. We find this argument to be without merit.

The constitutionality of the tax collection procedures provided for in the Sales and Use Tax Act has been sustained in *Gainesville-Hall County Economic Opportunity Organization v. Blackmon*, 233 Ga. 507 (212 SE2d 341) (1975). In the *Gainesville* case, this court noted that under Fuentes v. Shevin, 407 U.S. 67 (92 SC 1983, 32 LE2d 556) (1972), the seizure of property by the government for the collection of taxes constitutes one of those "extraordinary situations" justifying postponement of notice and hearing until after the property has been seized.

4. In the final enumeration of error, the appellant argues that the trial court erred in denying his request for a jury trial.

It is under the authority of Code Ann. § 92-7301 that a taxpayer may obtain a hearing in superior court on the question of whether a tax is legally due by filing an affidavit of illegality to the tax execution. It has been held in *Hicks v. Stewart Oil Co.*, 182 Ga. 654 (186 SE 802) (1936) that there is no right to a jury trial in such a proceeding. We therefore find this final enumeration of error to be without merit.

*Judgment affirmed. All the Justices concur.*

SUBMITTED NOVEMBER 20, 1978 — DECIDED JANUARY 24, 1979.

GEORGIA CODE ANNOTATED

§ 2-4401 (Art. VI, Sec. XV) Paragraph I. Right of trial by jury.

The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior court.

§ 92-7301 Levy of tax executions by State Revenue Commissioner. Illegality.

In the case of any tax due the State or any tax assessed by the State Revenue Commissioner, whether so specifically provided in the law levying the tax or not, the commissioner is empowered to issue an execution directed to all and singular the sheriffs of this State, commanding them to levy upon the goods and chattels, lands, and tenements of the taxpayer, which execution it shall be the duty of any sheriff to execute as in case or writs of execution from the superior courts. Whenever any such writ of execution has issued, the taxpayer, in order to determine whether the tax is legally due, may tender to the levying officer his affidavit of illegality thereto; and upon the payment of the tax if required as a condition precedent by the law levying the tax, and upon his giving a good and solvent bond for the eventual condemnation money in cases where the said law does not require the payment of the tax as a condition precedent, the levying officer shall return the same to the superior court of the county of the taxpayer's residence, except in case the law provides

EXHIBIT "B"

otherwise, and the same shall be summarily heard and determined by the court.



CERTIFICATE OF SERVICE

We hereby certify that on this twenty-third day of April, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Office of the Attorney General of the State of Georgia, c/o David Runnion, Esquire, State Judicial Building, Atlanta, Georgia.

J. Roger Thompson

Frank J. Petrella